In the United States Court of Federal Claims

OFFICE OF SPECIAL MASTERS

No. 00-407V

Filed: October 31, 2008

Not to be published.

COLLEEN BERRY ROPER, Petitioner, v. SECRETARY OF HEALTH AND HUMAN SERVICES, Respondent.	Vaccine Act; Damages

DECISION[1]

This is an action seeking an award under the National Childhood Vaccine Injury Compensation Program (see 42 U.S.C. § 300aa-10 *et seq*.), on account of an injury to the petitioner, Colleen Berry Roper. On December 9, 2005, I issued a "Ruling Concerning the Entitlement Issue" concluding that the petitioner was entitled to compensation.

Afterwards, damages hearings were held on April 22, 2008, as well as April 30, 2008. At the conclusion of these two hearings, I made tentative rulings on a number of issues including medications, pain and suffering, past and future lost wages, and cleaning services. I also gave oral rulings on certain issues during an electronically-recorded status conference held on October 29, 2008. By separate order, I have filed a CD of that conference into the record. Based on the rulings that I made at the conclusion of the hearing held on April 30, 2008, the parties were given an opportunity to discuss how to formulate a damages award based on those rulings. Both counsel are to be commended for their diligent efforts to bring this matter to a conclusion which

[1]This document constitutes my final "decision" in this case, pursuant to 42 U.S.C. § 300aa-12(d)(3)(A). Unless a motion for review of this decision is filed within 30 days, the Clerk of this Court shall enter judgment in accord with this decision.

This document will not be sent to electronic publishers as a formally "published" opinion. However, because this document contains a reasoned explanation for my action in this case, I intend to post this document on the United States Court of Federal Claims' website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002). Therefore, each party has 14 days within which to request redaction "of any information furnished by that party (1) that is trade secret or commercial or financial information and is privileged or confidential, or (2) that are medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." Vaccine Rule 18(b). Otherwise, this entire document will be available to the public. *Id.* See also 42 U.S.C. § 300aa-12(d)(4)(B).

fully incorporates my rulings. For example, the parties were required to make certain calculations on net present value, and I applaud the parties' efforts to work cooperatively on these calculations.

The issues of past unreimbusable expenses and future medical care required me to make certain preliminary rulings. At the hearings convened in this matter, respondent objected to compensation for certain tightly-controlled medications. Ms. Roper testified that she has taken a tightly controlled medication in the past and would again in the future. The government argued that the drug was not legally available in the United States unless the prescribing physician applied for an exception through the Food and Drug Administration. Respondent asserted there was no documentation that the exception had been applied for. I ruled that if the process for gaining approval had not yet been completed, it likely would be completed in the near future, and that petitioner would be permitted to gain access to the drug as she appears to fit the criteria for an exception. Transcript of April 30, 2008 hearing at 135. With that issue decided, petitioner proffered an amount of $15,105.00 for past unreimbursable expenses at the recorded status conference convened on October 29, 2008. Respondent asserted he would not present further evidence on this matter or object further. Similarly, with the medication issue decided, petitioner proffered the amount of $114,094.00 for future medical expenses, and respondent again indicated he would present no further objection or evidence on that amount.

At the hearing in this matter, respondent advocated for an award of pain and suffering in the range of $75,000.00 to $100,000. *Id.* at 100. Petitioner, on the other hand, argued that the total amount of pain and suffering should be $200,000. *Id.* at 98. At the conclusion of the hearing I indicated that, as a preliminary matter, I would accept petitioner's recommendation on this issue. In filings made after the hearing, and again at the recorded status conference of October 29, 2008, respondent argued that if I adopted petitioner's recommendation as my final ruling on the matter, that the $200,000 should be, at most, evenly split between past and future pain and suffering, while petitioner argued that the correct apportionment should be $150,000.00 in past pain and suffering and $50,000.00 in future pain and suffering. At the status conference on October 29, 2008, I explained that I would adopt petitioner's recommendation of $200,000.00 as a total award for pain and suffering as my final decision and would also accept petitioner's proposal of $150,000.00 for past pain and suffering and $50,000.00 for future pain and suffering. With the future pain and suffering reduced to net present value, the total award for pain and suffering is $179,922. *See Youngblood v. Secretary of HHS*, 32 F.3d 552 (Fed. Cir. 1994). My opinion is based on the notion that Ms. Roper has experienced most of her emotional anguish in adjusting to her injury, which she has now endured for a number of years, and that the amount of pain and suffering she will experience in the future will likely lessen.

The biggest disagreement between the parties dealt with the issue of future lost wages. Respondent presented the testimony of vocational specialist Peter Stickney, M.S., CRC. Mr. Stickney opined that Ms. Roper had no measurable lost wages as her nursing background provided employment alternatives that allowed her to make at least as much money, if not more, than she did before the injury. Petitioner presented the testimony of Estelle Davis, Ph.D., CRC. Dr. Davis testified that petitioner had considerable wage loss, and was unable to work as many hours per year as she was prior to the injury. The parties disputed whether there was any wage loss, and, if there was, how many hours per year Ms. Roper could work and how long she would

be in the workforce. At the conclusion of the hearing held on April 30, 2008, I rejected Mr. Stickney's testimony. I determined that under Mr. Stickney's analysis, Ms. Roper would essentially be asked to work in a field other than the one of her choosing. I found such analysis to be unacceptable, and therefore generally accepted the analysis of petitioner's expert, Dr. Davis. *Id.* at 135-142. I indicated that I would be fashioning an award based on a calculation of the number of hours she could not work due to the injury multiplied by the number of years she would reasonably be in the workforce. The parties disagreed as to when Ms. Roper would return to the workforce based upon a hiatus for raising children.

I reiterated my findings at the recorded status conference on October 29, 2008. In addition, at subsequent status conferences between the hearing of April 30, 2008, and the status conference of October 29, 2008, I indicated to the parties that I would likely accept petitioner's recommendations regarding the reduced number of hours Ms. Roper could work, but would likely accept respondent's recommendations regarding when Ms. Roper would return to the workforce and how long she would be employable.

Based on my rulings, petitioner proffered the amount of $84,791.61 for past lost wages and $570,000.00 in future lost wages. Respondent indicated that the government would present no further evidence or objection to the calculations petitioner presented.

Accordingly, I find that petitioner is entitled to the following amounts of compensation:

Item	Amount
Past lost wages	$ 84,791.61
Future lost wages	$ 570,000.00
Past unreimbursable expenses	$ 15,105.00
Pain and suffering	$ 179,922.00
Future medical expenses	$ 114,094.00
Total	**$ 963,912.61**

In the absence of a timely-filed motion for review of this Decision, the clerk shall enter judgment in the amount of **$ 963,912.61**.

/s/George L. Hastings, Jr.

George L. Hastings, Jr.
Special Master